In The Senate of the United States

Sitting as a Court of Impeachment

In re:	)
Impeachment of G. Thomas Porteous, Jr.,	)
United States District Judge for the	)
Eastern District of Louisiana	)

THE HOUSE OF REPRESENTATIVES' OPPOSITION TO JUDGE G. THOMAS PORTEOUS, JR.'S MOTION TO EXCLUDE THE USE OF HIS PREVIOUSLY IMMUNIZED TESTIMONY

The House of Representatives (the "House"), through its Managers and counsel, respectfully opposes Judge G. Thomas Porteous, Jr.'s Motion to Exclude the Use of His Previously Immunized Testimony (the "Motion to Exclude").[1] Judge Porteous has failed to present any credible argument to justify the exclusion before the Senate of his previous immunized testimony. Moreover, the Judicial Conference of the United States[2] considered it proper to provide Judge Porteous's testimony to the House of Representatives for use in the consideration of Judge Porteous's impeachment, and the United States District Court for the District of Columbia specifically denied Judge Porteous's emergency request to prevent the House Impeachment Task Force from using Judge Porteous's prior testimony in these impeachment proceedings.

[1] The House incorporates by reference into this Opposition its "Notice of Intent to Introduce at Trial Judge Porteous's Testimony Before the Fifth Circuit Special Committee," filed with the Committee on July 21, 2010, which contains a detailed discussion of the key substantive admissions made by Judge Porteous during his Fifth Circuit testimony.

[2] The Judicial Conference of the United States is chaired by the Chief Justice of the Supreme Court and is comprised of the Chief Justice, the chief judge of each United States Court of Appeals, a district court judge from each regional judicial circuit, and the chief judge of the Court of International Trade.

To exclude Judge Porteous's prior sworn testimony from the Senate's consideration, after the Judicial Conference determined that this testimony was proper for consideration by the House, would deny the Senate the ability to assess the full and complete record in this case.[3] Judge Porteous's Motion to Exclude should therefore be denied. In support of its Opposition, the House respectfully submits:

PROCEDURAL BACKGROUND

Judge Porteous was afforded full and complete due process rights during the Fifth Circuit Special Committee proceedings. He was first notified of the appointment of the Fifth Circuit

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[3] As one example of the inaccurate record that would be created if Judge Porteous's prior sworn testimony were excluded, consider the argument raised by Judge Porteous's lawyers in their Motion to Dismiss Article III, related to Judge Porteous's bankruptcy. On page 16 of the Motion to Dismiss Article III, Judge Porteous's lawyers argue that Judge Porteous understood markers to be "checks (which are used to 'buy' chips from the casino, and which can be cashed at any time by the casino via electronic money transfer), not debt." No citation is given to this assertion, because Judge Porteous testified to the exact opposite conclusion before the Fifth Circuit Special Committee:

> Q: Judge Porteous, you're familiar with the term "marker," aren't you?
>
> A: Yes, sir.
>
> Q: Would it be fair to state that, "A marker is a form of credit extended by a gambling establishment, such as a casino, that enables the customer to borrow money from the casino. The marker acts as the customer's check or draft to be drawn upon the customer's account at a financial institution. Should the customer not repay his or her debt to the casino, the marker authorizes the casino to present it to the financial institution or bank for negotiation and draw upon the customer's bank account any unpaid balance after a fixed period of time." Is that accurate?
>
> A: I believe that's correct and probably was contained in the complaint or . . . the second complaint. There's a definition contained.
>
> Q: And you have no quarrel with the definition?
>
> A: No, sir.

See Fifth Circuit Special Committee Hearing Transcript ("Fifth Circuit Transcript"), at 64–65 (October 29, 2007) (emphasis added). Relevant excerpts from that Transcript are attached to this Opposition as Attachment 1.

Special Committee to investigate the judicial misconduct complaint filed by the United States Department of Justice (the "DOJ Complaint") against him, and he was also advised of the Rules Governing Complaints of Judicial Misconduct or Disability, on May 24, 2007 – five months before the Special Committee hearing ultimately took place.[4] Also on May 24, 2007, Judge Porteous was provided with a copy of the DOJ Complaint. The DOJ Complaint contained a detailed factual statement of the allegations against Judge Porteous.[5]

At the Fifth Circuit Special Committee hearing on October 29, 2007, Judge Porteous argued both for a continuance of the hearing in its entirety and for a continuance before he would be required to testify pursuant to a grant of immunity. First, in response to Judge Porteous's request for a continuance of the proceedings in their entirety, Mr. Woods explained to the Special Committee the detailed amount of evidence and materials that Judge Porteous had been given prior to the hearing:

> Mr. Woods: Yes, your Honor. To respond to Judge Porteous, beginning in August [2007], we invited his counsel to come and inspect all documents that we had, which were in boxes that had been received from the Department of Justice. His counsel at that time, Mike Ellis, said that he did not intend to offer any documents, he did not need to review the documents, he was only going to offer the medical records.
>
> Nonetheless, I started sending him grand jury testimony and the bankruptcy file and a number of other voluminous files back in August, that he

[4] See Letter from the Honorable Edith H. Jones to the Honorable G. Thomas Porteous, Jr. (May 24, 2007) (Attachment 2). It should be noted that Rule 10(c) of the Rules Governing Complaints of Judicial Misconduct or Disability for the Fifth Circuit, as amended through July 15, 2003, specifically stated that "[a]ll persons who are believed to have substantial information will be called as special committee witnesses, including the complainant and the subject judge. The witnesses may be questioned by the special committee or its counsel. The subject judge will be afforded the opportunity to cross-examine committee witnesses, personally or through counsel."

[5] See Judicial Misconduct Complaint filed by United States Department of Justice (May 18, 2007). (A copy of the DOJ Complaint is attached to Judge Porteous's Motion to Dismiss Article III as Exhibit 1. It is also marked as HP Exhibit 4 on the House's Exhibit List.)

could begin to review. And then in September and October, we provided documents unsolicited to try and give him all the documents in the case.

The charge itself is very detailed. He knows the allegations and the – it could not be more specific, naming what the offense is, what – the date of the offense, what document was falsified, what witness will testify to certain events. He's been on notice since May the 24th [2007] of very specific allegations, and we've offered the documents as soon as we got them from the Department of Justice.

Judge Benavides: Mr. Woods, you refer to the May 24th date. Is that the date that the complaint was forwarded to Judge Porteous?

Mr. Woods: Yes, your honor.

Judge Benavides: And that complaint, as I understood it, referred to the activities and details of the activities that were subsequently the basis of the complaint?

Mr. Woods: That's correct, your Honor.

Judge Benavides: So, the factual allegations have been made known with reference to the complaint since at least May 24th?

Mr. Woods: Yes, your Honor. And Judge Porteous was under criminal investigation by the Department of Justice, as he pointed out, for a number of years. His attorney at that time, Kyle Schonekas, appeared to be very much on top of the case, appeared at grand jury, and instructed various witnesses – well, one witness, Claude Lightfoot, Judge Porteous's bankruptcy counsel, not to answer certain questions. So, he was on top of the investigation, knew the allegations, and I'm sure kept this counsel of Judge Porteous advised.

Judge Benavides: Is there anything with – in reference to the actual complaint that was tendered later, that wasn't the subject of – or already information contained in the complaint from the Justice Department of May 24?

Mr. Woods: No, your Honor. We developed no new evidence other than to try to confirm everything in the complaint. I would point out that Judge Porteous was examined by Dr. Gabbard, and that report was furnished . . . to Judge Porteous as soon as we received it. So, that is the only new information that comes outside of that period of time alleged in the complaint.[6]

Second, regarding Judge Porteous's request for a continuance before he would be required to testify under a grant of immunity, Mr. Woods's co-counsel, Larry Finder, pointed out

[6] See Fifth Circuit Transcript, supra note 3, at 6–8.

that the Rules Governing Complaints of Judicial Misconduct or Disability (which had been identified to Judge Porteous in May 2007) specifically identified the subject judge as a witness to be called to testify:

> Mr. Finder: . . . Under the rules under which we're operating, Rule 10C, Special Committee Witness. . . .
>
> "All persons who are believed to have substantial information will be called as Special Committee witnesses, including the complainant and the subject judge."
>
> So, I think that there is no surprise here. It's in the rules, which were provided a long, long time ago.[7]

Judge Porteous thereafter testified pursuant to a standard compulsion and immunity order, signed by Chief Judge Edith H. Jones (the "Immunity Order"). By immunizing Judge Porteous, the Fifth Circuit assured that Judge Porteous would have the opportunity to testify freely without fear of potential criminal consequences. Under any interpretation of the procedures, this was of benefit to Judge Porteous. It reflects not overreaching by the Special Committee, but rather, the Special Committee's concerns about not putting Judge Porteous in a position in which his testimony could be used against him in a criminal case. These concerns naturally flowed from a consideration of the DOJ complaint letter. As Judge Jones correctly stated: "[I]mmunity is better than non immunity, sir."[8]

The testimony that Judge Porteous thereafter gave contained numerous statements highly relevant to three of the Articles of Impeachment subsequently passed by the House of Representatives – Articles I, III, and IV. As explained in detail in the House's Notice of Intent to Introduce at Trial Judge Porteous's Testimony Before the Fifth Circuit Special Committee, these

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[7] Id. at 33–34 (emphasis added).

[8] Id. at 34.

statements included (i) admissions regarding the receipt of cash from Messrs. Amato and Creely, (ii) admissions that these cash transactions "occasionally" followed Judge Porteous's assignment of curatorships to Creely, (iii) admissions that Judge Porteous received an envelope of cash containing approximately $2,000 from Amato while the Liljeberg case was pending before him, and (iv) numerous admissions pertaining to Judge Porteous's false statements in his bankruptcy case.

ARGUMENT

Judge Porteous's Motion to Exclude should be denied. The Immunity Order was properly granted by Chief Judge Jones for the purpose of considering whether Judge Porteous had engaged in judicial misconduct. Thereafter, Judge Porteous raised his "due process"-type complaints at numerous stages of the review, including before judges sitting as members of the Judicial Conference of the United States. For the same reasons that there was no cognizable legal impediment to the consideration of his immunized testimony for purposes of judicial discipline, there is likewise no constitutional principle that would support the exclusion of Judge Porteous's prior immunized testimony from consideration by the Senate. Indeed, the impeachment proceedings are, in a sense, a continuation of the judicial misconduct inquiry that began in the Fifth Circuit.[9] Neither the proceedings in the House nor the Senate are criminal and therefore Judge Porteous's testimony should not be precluded.

[9] The maximum disciplinary action that the Fifth Circuit Judicial Council could impose against Judge Porteous was a suspension from office without pay, which the Council imposed. Any further action to be taken against Judge Porteous, such as removal from office, must be done by Congress. Thus, based on the Fifth Circuit Judicial Council's inability to take any further action, it forwarded the Porteous matter to the Judicial Conference of the United States.

I. IMPEACHMENT PROCEEDINGS ARE NOT A "CRIMINAL CASE" AND PRIOR IMMUNIZED TESTIMONY IS THEREFORE ADMISSIBLE

The Immunity Order signed by Chief Judge Jones, compelling Judge Porteous to testify before the Fifth Circuit Special Committee, specifically tracked the language of 18 U.S.C. § 6002, which provides use immunity to compel testimony in response to a witness's Fifth Amendment claim:

> ORDERED, in compliance with 18 U.S.C. §§ 6002-6003 and pursuant to 28 U.S.C. § 353, that the witness, the Honorable G. Thomas Porteous, Jr., shall provide testimony and other information as to all matters about which he may be interrogated in a proceeding before or ancillary to the United States Court of Appeals for the Fifth Circuit; and that no testimony or other information that he provides under this order and no information directly or indirectly derived from such testimony or other information shall be used against him in any criminal case, except in a prosecution for perjury, making a false statement, or failure to comply with this order.[10]

The Porteous Immunity Order neither limited the House of Representatives Impeachment Task Force from using Judge Porteous's prior testimony, nor does it limit the Senate from admitting and using Judge Porteous's prior sworn testimony, because neither proceeding is a criminal case.

Judge Porteous has conceded that an impeachment proceeding is not a criminal case.[11] It is entirely lawful in a disciplinary proceeding concerning a judge or lawyer for the sworn immunized testimony of the individual in question to be considered by the body charged with determining whether removal from office is warranted. No judge has a property interest in his office. Removal from office is not an imprisonment, fine, or forfeiture of private property, nor are life or liberty in jeopardy in an impeachment. Indeed, this idea was put to rest by the

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[10] See Order, In Re Matters Involving U.S. District Judge G. Thomas Porteous, Jr., Dckt. No. 07-05-351-0085 (October 5, 2007) (emphasis added). (A copy of the Porteous Immunity Order is attached to Judge Porteous's Motion to Exclude the Use of His Previously Immunized Testimony as Exhibit 2. It is also marked as HP Exhibit 17 on the House's Exhibit List.)

[11] See Judge G. Thomas Porteous, Jr.'s Motion to Exclude the Use of His Previously Immunized Testimony, at 4.

Supreme Court, which held in Nixon v. United States that impeachment proceedings are separate and distinct from criminal proceedings:

> There are two additional reasons why the Judiciary, and the Supreme Court in particular, were not chosen to have any role in impeachments. First, the Framers recognized that most likely there would be two sets of proceedings for individuals who commit impeachable offenses – the impeachment trial and a separate criminal trial. In fact, the Constitution explicitly provides for two separate proceedings . . . . The Framers deliberately separated the two forums to avoid raising the specter of bias and to ensure independent judgments.[12]

Judge Porteous's assertion that impeachment is "criminal in nature" adds nothing to his argument. Either the impeachment is a "criminal case," at which his immunized testimony may not be used against him, or it is not such a case. Removal from office is not a criminal sanction, and therefore the use of Judge Porteous's immunized testimony cannot be precluded in the Senate proceedings.

Judge Porteous relies on Federal case law (dating back to as early as 1886) in support of his "criminal in nature" argument. Those cases reference such topics as a customs fraud statute and the forfeiture of money after a defendant was convicted of violating gambling and tax statutes. All of the cases to which Judge Porteous cites are inapposite to these impeachment proceedings because none of those cases even remotely involved judicial impeachments.[13]

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[12] 506 U.S. 224, 234 (1993) (emphasis added).

[13] See Michael J. Gerhardt, Rediscovering Nonjusticiability, Judicial Review of Impeachments after Nixon, 44 DUKE L. J. 231, 233–34 (1994) ("[N]o area of constitutional law needs to be nonjusticiable more than impeachment, . . . because the textual, historical, and structural bases for its nonjusticiability are stronger than those for any other area. . . . In other words, impeachment and the political question doctrine make each other possible."); Akhil Reed Amar, On Impeaching Presidents, 28 HOFSTRA L. REV. 291, 301 (1999) ("Impeachment is, technically, what judges call a 'political question' that ordinary courts will not touch. . . . There is indeed 'judicial review' of impeachment issues, but this review occurs in the Senate itself, which sits as a high court of impeachment.") (emphasis added).

Judge Porteous's second argument that impeachments are "criminal in nature" purports to be based on the text of the Constitution itself. However , the historical development of impeachment in this country makes it abundantly clear that the Framers of the Constitution had no intention of impeachment proceedings being treated akin to criminal proceedings. As Alexander Hamilton observed at the time of the debates surrounding the adoption of the Constitution, impeachment trials were understood as deliberative sessions for the Senate to decide whether an official had committed an "abuse or violation of some public trust."[14] Justice Story likewise observed, in the early nineteenth century, that "an impeachment is a proceeding of a purely political nature. It is not so much designed to punish an offender as to secure the state against gross official misdemeanors. It touches neither his person nor his property; but simply divests him of his political power."[15] And, as noted, the text of the Constitution specifically provides for a single remedy upon impeachment: removal from Office. This is not a criminal punishment.

Any possible doubt after the Constitution's adoption on whether impeachment proceedings were criminal in nature was settled in the early impeachment inquiries, such as, for example, the impeachment of Judge John Pickering in 1803 for performing his judicial functions while drunk and for acts of indecency.[16] And indeed, the Senate in the modern era has removed a Federal judge, for example, on a single article of impeachment charging that the Judge's actions had "brought his court into scandal and disrepute, to the prejudice of said court and

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[14] THE FEDERALIST NO. 65, at 396 (Alexander Hamilton) (Rossiter, ed., 1961).

[15] Joseph Story, Commentaries on the Constitution § 801 (1833).

[16] See Articles of Impeachment of Judge John Pickering, reprinted in IMPEACHMENT: SELECTED MATERIALS, 93d Cong., 1st Sess., at 131 (1973), as reprinted in, U.S. IMPEACHMENT: SELECTED MATERIALS, 105th Cong., 2d Sess., at 1267 (1998).

public confidence in the administration of justice."[17] It is the preservation of the integrity of the courts that is at issue in Judge Porteous's impeachment.

The third and final argument Judge Porteous raises to support his contention that impeachment proceedings are "criminal in nature" is that one sentence of one law review article written by the House's expert, Professor Akhil Amar of Yale Law School, states that "[i]mpeachment is a quasi-criminal affair." However, Judge Porteous's reliance on this single phrase, taken out of context, from an article written in 1999, does not advance his position. In the article in question, Professor Amar does not, of course, suggest that there are any procedural consequences that result from his characterization of impeachment as "quasi-criminal." Rather, Professor Amar's publications over the last fifteen years contravene Judge Porteous's assertions.[18]

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[17] See Proceedings of the U.S. Senate in the Trial of Impeachment of Halstead L. Ritter, S. Doc. No. 200, 74th Cong., 2d. Sess., at 611 (1936). See also, e.g., NAT'L COMMISSION ON JUDICIAL DISCIPLINE AND REMOVAL 31 (1873) (noting that the House voted to impeach District Judge Mark Delahay for unsuitable personal habits and questionable financial dealings); Hearing Before the Task Force on Judicial Impeachment of the Committee on the Judiciary, To Consider Possible Impeachment of United States District Judge G. Thomas Porteous, Jr. (Part IV), Ser. No. 111-46, 111th Cong., 1st Sess., at 29, Written Statement of Professor Michael Gerhardt, at 3 (Dec. 15, 2009). (in reviewing the historical record of impeachments, noting that "[o]f the seven men (all federal judges) actually removed from office by the Senate, four were charged with and convicted of misconduct that did not constitute any indictable offenses").

[18] See Akhil Reed Amar, Fifth Amendment First Principles: The Self-Incrimination Clause, 93 MICH. L. REV. 857, 909 (March 1995) ("Textually, the Fifth Amendment speaks to witnessing *within* the criminal case, not beyond."); Akhil Reed Amar, Self-Incrimination and the Constitution: A Brief Rejoinder to Professor Kamisar, 93 MICH. L. REV. 1011, 1011 (March 1995) ("When John Doe is obliged—under pain of contempt—to testify before Congress, or in a civil case, the Fifth Amendment has not (yet) been violated: it applies only to a criminal case. If Doe's congressional, or civil, testimony is never introduced as evidence in a *criminal* case, the Amendment, on our plain meaning reading, once again has never been violated: Doe has never been made an involuntary *witness* against himself in a criminal case) (underlined emphasis added); Akhil Reed Amar, Right and Huang: How to Prevent an Oliver North-style Escape, Slate (July 20, 1997) ("Senate hearings are obviously not a 'criminal case.'"); AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 187, 200 (2005) (noting that the U.S. system of impeachment is "sharply and distinct from ordinary criminal punishment" and that in the

II. THE JUDICIAL CONFERENCE OF THE UNITED STATES CONCLUDED THAT IT IS PROPER FOR JUDGE PORTEOUS'S IMMUNIZED TESTIMONY TO BE USED IN THESE IMPEACHMENT PROCEEDINGS

The use of Judge Porteous's immunized Fifth Circuit testimony in these impeachment proceedings has been sanctioned by the Judicial Conference of the United States.[19] It would be extraordinary indeed for the Senate to reject the uniform view of the judicial branch (including judges from Judge Porteous's own Circuit) that Judge Porteous's immunized testimony is properly to be considered in determining his fitness for Office.

A. The Judicial Conference of the United States's Receipt of the Record from the Fifth Circuit and Transmittal of the Record to the House of Representatives

After the Fifth Circuit Special Investigatory Committee concluded its investigation and hearing into the possible judicial misconduct of Judge Porteous, it forwarded to the Fifth Circuit Judicial Council (the "Judicial Council") a comprehensive written Report presenting both the findings of the investigation and the Special Committee's recommendation for necessary and appropriate action by the Judicial Council. On November 20, 2007, the Judicial Council informed Judge Porteous that he could examine the Special Committee Report and re-examine the evidence on which it was based at the headquarters of the Court of Appeals for the Fifth Circuit in New Orleans, Louisiana. Judge Porteous was also extended the opportunity to file a written reply to the Special Committee Report, which he submitted on December 4, 2007, to which the Special Committee replied.

Constitution, "the words 'high . . . Misdemeanors' most sensibly meant high misbehavior or high misconduct, whether or not strictly criminal.").

[19] Unlike the miscellaneous federal cases that Judge Porteous cites to in his Motion to Exclude, the Judicial Conference has concluded it is appropriate for Judge Porteous's prior immunized testimony to be used in these impeachment proceedings.

On December 13, 2007, the Judicial Council held a meeting at which it fully considered the Special Committee's Report, Judge Porteous's Reply, the Special Committee's Response, and the record of the proceedings before the Special Committee. Judge Porteous appeared before the Judicial Council and spoke in his own defense. By a majority vote, the Judicial Council determined that the Report and the record contained "substantial evidence supporting the allegations listed in the Special Investigatory Committee Report," and concluded that Judge Porteous had "engaged in conduct which might constitute one or more grounds for impeachment under Article II of the Constitution."[20] The Judicial Council thereafter transmitted to the Chief Justice of the United States, as presiding office of the Judicial Conference, all relevant materials related to Judge Porteous, including the full transcript which contained Judge Porteous's testimony from the Fifth Circuit Special Committee hearing.

The Judicial Conference Committee on Judicial Conduct and Disability (the "Judicial Conference Committee") thereafter issued a Report and Recommendations to the Chief Justice of the United States and Members of the Judicial Conference of the United States finding "substantial evidence that Judge Porteous has engaged in misconduct that may warrant consideration by the Congress of impeachment under Article II of the United States Constitution."[21] The Judicial Conference Committee's Report and Recommendations specifically addressed Judge Porteous's arguments that he had been denied his due process rights at the Fifth Circuit Special Committee hearing and concluded:

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[20] See Memorandum Order and Certification by the Judicial Council of the Fifth Circuit, at 4 (December 20, 2007). (A copy of the Memorandum Order and Certification is marked as HP Exhibit 6(a) on the House's Exhibit List.)

[21] See Report and Recommendations of the Judicial Conference Committee on Judicial Conduct and Disability, at 2 (June 2008). (A copy of the Report and Recommendations is marked as HP Exhibit 7(c) on the House's Exhibit List.)

> The Committee finds no deprivation of procedural due process.
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> * * *
>
> With regard to the opportunity to be heard, adequate time for preparation, and the right to counsel, Judge Porteous had two different counsel, was given several extensions of time to respond to the complaint, and obtained two postponements of the SC hearing.
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> * * *
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> Any lack of preparation time or of counsel to represent him was the result of Judge Porteous's indecision as to his future course of action rather than a failure by the SC to accord sufficient time. There is no reason to conclude that Judge Porteous was caught unaware by the evidence or charges against him or that additional time would have altered the record in even a trivial, much less material, way. The hearing and evidence drew upon the long DOJ investigation in which he had been represented by counsel. The salient issues concern evidence of conduct about which there is little dispute. Judge Porteous does not deny that there were false statements in his financial disclosure forms, that he solicited and received cash and things of value from lawyers who appeared before him, that he failed to recuse in matters where such lawyers appeared, [or]that he made false statements in his personal bankruptcy proceedings . . . .
>
> * * *
>
> Accordingly, the process afforded to Judge Porteous easily met the due process standard.[22]

Thereafter, on June 17, 2008, the Judicial Conference of the United States, chaired by Supreme Court Chief Justice Roberts, determined unanimously, upon the recommendation of the Judicial Conference Committee, to transmit a Certificate to the United States House of Representatives which provided, in part:

> Pursuant to 28 U.S.C. § 355(b)(1), the Judicial Conference of the United States certifies to the House of Representatives its determination that consideration of impeachment of United States District Judge G. Thomas Porteous (E.D. La.) may be warranted. This determination is based on evidence provided in the Report by the Special Investigatory Committee to the Judicial Council of the United States Court of Appeals for the Fifth Circuit and the Report and Recommendations of the Committee on Judicial Conduct and Disability. Said certification is

[22] Id. at 15–17 (emphasis added).

transmitted with the entire record of the proceeding in the Judicial Council of the Fifth Circuit and in the Judicial Conference of the United States.[23]

The Judicial Conference thus explicitly chose to transmit to the House Judge Porteous's Fifth Circuit immunized, sworn testimony, for the House's use in the possible impeachment of Judge Porteous. The propriety of using Judge Porteous's prior immunized testimony could hardly receive a more compelling endorsement.

B. The United States District Court for the District of Columbia Denied Judge Porteous's Motion for a Temporary Restraining Order to Preclude the House of Representatives from Using His Immunized Fifth Circuit Testimony

On the eve of the House Impeachment Task Force hearings, Judge Porteous filed a lawsuit in the United States District Court for the District of Columbia, seeking a temporary restraining order preventing the House from using Judge Porteous's prior immunized testimony "in any way, whether direct or indirect, evidentiary or non-evidentiary, in connection with the work of the Impeachment Task Force."[24] After fully considering Judge Porteous's arguments, and hearing oral argument on the matter, the United States District Court denied Judge Porteous's Motion, thereby refusing to issue an order that effectively would have enjoined the House from utilizing Judge Porteous's prior sworn testimony.[25]

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[23] Certificate of the Judicial Conference of the United States to the Speaker of the United States House of Representatives (June 17, 2008) (emphasis added). (A copy of the Certificate of the Judicial Conference is marked as HP Exhibit 7(b) on the House's Exhibit List.)

[24] See Memorandum of Points and Authorities in Support of Judge G. Thomas Porteous, Jr.'s Motion for a Temporary Restraining Order and a Preliminary Relief, Porteous v. Baron, et al., Case No. 09-02131 (D.D.C. Nov. 13, 2009), at 1 (Attachment 3). Judge Porteous's arguments in his present Motion to Exclude are in many respects identical to the arguments Judge Porteous presented to the United States District Court.

[25] See PACER Docket Report, Porteous v. Baron, et al., Case No. 09-02131 (D.D.C.), at 3–4 ("Minute Entry for proceedings held before Judge Richard J. Leon. Motion Hearings held on 11/16/2009. Plaintiff's Motion for Temporary Restraining Order – DENIED.") (Attachment 4). On April 7, 2010, in light of the House's supplemental pleading in support of its motion to

CONCLUSION

Judge Porteous's attempts to suppress key evidence from consideration by the Senate Impeachment Trial Committee – namely, his prior sworn, immunized testimony – can only serve to warp the fact finding process. The Committee's main function is to receive evidence and to take testimony, and to thereafter report all of the evidence to the full Senate. The Committee and the Senate would be severely harmed in their ability to fully understand and consider the facts in this case if they are deprived of the opportunity to consider the prior sworn immunized testimony of Judge Porteous.

WHEREFORE, the House respectfully requests that Judge Porteous's Motion to Exclude the Use of His Previous Immunized Testimony be denied, and that Judge Porteous's immunized testimony before the Fifth Circuit Special Committee be admitted into evidence before the Senate Impeachment Trial Committee.

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dismiss – in which the House informed the court that it had adopted Articles of Impeachment against Judge Porteous – Judge Leon issued an order requiring the parties to show cause why the district court case should not be dismissed as moot. Id. at 4.

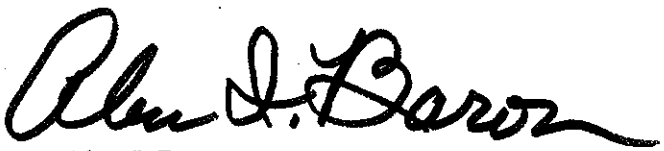
Respectfully submitted,

THE UNITED STATES HOUSE OF REPRESENTATIVES

By

Adam Schiff, Manager

Bob Goodlatte, Manager



Alan I. Baron
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Managers of the House of Representatives: Adam B. Schiff, Bob Goodlatte, Zoe Lofgren, Henry C. "Hank" Johnson, F. James Sensenbrenner, Jr.

July 28, 2010